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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF FOR APPELLANT

MELVIN L. WULF
JOEL M. GORA
JUDITH MEARS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

JOHN C. LOWE
F. GUTHRIE GORDON, III
American Civil Liberties
Union of Virginia
1111 West Main Street
Charlottesville, Virginia

Attorneys for Appellant

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In The

Supreme Court of the United States

October Term, 1974

No. 73-1309

Jeffrey Cole Bigelow,

Appellant,

-v.-

Commonwealth of Virginia,

Appellee.

On Appeal From the
Supreme Court of Virginia

BRIEF FOR APPELLANT

Opinions Below

The per curiam opinion of the Supreme Court of Virginia, entered following the remand from this Court, is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth in the Jurisdictional Statement [hereinafter J.S.], at pp. 21a-22a. The order of this Court, vacating the earlier decision of the

court below and remanding for further consideration, is reported at 413 U.S. 909 and is set forth at J.S. 20a. The first opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173, and is set forth at J.S. 1a-11a. The judgment of conviction in the Circuit Court, Albemarle County, Virginia, filed July 15, 1971,

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on November 26, 1973, and a notice of appeal was filed in that court on December 20, 1973. The Jurisdictional Statement was filed on February 25, 1974 and jurisdiction was noted on July 8, 1974. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. Section 1257(2). The following decision sustains the jurisdiction of this Court to review the judgment by appeal in this case: Griswold v. Connecticut, 381 U.S. 479 (1965).

Statute Involved

Virginia Code, Section 18.1-63:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a mis-demeanor.

Question Presented

1. Whether Virginia Code Section 18.1-63, prohibiting persons by "publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner," from encouraging or prompting the procuring of an abortion, violates the First Amendment on its face or as applied in this case, and is vague and overbroad and thereby violates the First Amendment and the Due Process Clause of the Fourteenth Amendment?

Statement of the Case*

The appellant, Jeffrey C. Bigelow, was a director, managing editor, and responsible officer of the Virginia Weekly, an underground newspaper (J.S. 4a) published by the Virginia Weekly Associates of Charlottesville, Virginia, and distributed in the Charlottesville area.

On February 8, 1971, the Virginia Weekly, Volume V, No. 6, was published and circulated in Albemarle County, Virginia, and in particular on the grounds of the University of Virginia. The publication and circulation were the direct responsibility of the appellant.

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*The facts were stipulated by counsel in the trial court and constituted the record on appeal in the state courts. The stipulation is contained in the separate Appendix [hereinafter App.] at p. 3. A copy of the issue of the newspaper which carried the advertisement is part of the record.

The February 8 issue carried the following advertisement on page 2:

--

UNWANTED PREGNANCY

LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN
ACCREDITED HOSPITALS AND
CLINICS AT LOW COST
Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, New York 10022

or call any time

(212) 371-6670 or (212) 371-6650

Available 7 Days a Week

Strictly Confidential. We will make
all arrangements for you and help you
with information and counseling.

--

On May 13, 1971, the appellant was charged with violating Section 18.1-63 of the Code of Virginia which provided as follows:

> If any person by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage he shall be guilty of a misdemeanor.1/

In July, 1971, a non-jury trial on stipulated facts was held in the Circuit Court for Albemarle County. The only evidence consisted of the stipulation, the advertisement, and the June 1971 issue of Redbook Magazine, distributed in Virginia and in Albemarle County and containing abortion information (App., p. 3). After overruling appellant's objections to the constitutionality of the statute, the Circuit Court found the appellant guilty of violating the statute. He was sentenced to pay a fine of $500.00, with $350.00 of the fine suspended, conditional upon appellant's not violating the statute in the future (J.S. 15a).

Appellant timely noticed an appeal to the Supreme Court of Virginia, assigning as error the trial court's ruling that the statute applied to the advertisement, and the overruling of appellant's First Amendment objections to that statute (J.S. 16a-17a).

1/In 1972, that Section was amended to read as follows:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor.

Thereafter, the Supreme Court of Virginia granted review, and in a 4 to 2 decision upheld the constitutionality of Section 18.1-63 and its applicability to the advertisement in question. The Court first held that the advertisement did encourage or prompt the procuring of abortion within the meaning of the statute, and was not merely informational (J.S. 3a). Second, the Court ruled that the prohibition of the statute could constitutionally be applied to the newspaper advertisement because of the broad governmental power "to regulate commercial advertising," particularly in the medical health field (J.S. 3a-7a).2/ Finally, the Court ruled that the appellant lacked standing to challenge the facial overbreadth of the statute because his First Amendment activity "was of a purely commercial nature":

> Thus, where, as here, a line can be drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny

2/ The stipulated facts contain no evidence to support the assumption below that both the advertisement and the advertiser were "commercial." The court so assumed because of the text of the advertisement.

> Bigelow standing to assert the rights of doctors, husbands, and lecturers. (J.S.10a).

The two dissenters found it unnecessary to determine whether the advertisement was "commercial" in the constitutional sense, because they concluded that the appellant clearly had standing "to challenge as overbroad the criminal statute under which he was convicted" and that the statute "seeks to limit freedom of speech in a vague and impermissibly broad manner." (J.S. 11a).

Thereafter, the appellant filed a timely Jurisdictional Statement with this Court (No. 72-932). On June 25, 1973, the Court entered the following order:

> Judgment vacated and case remanded to the Supreme Court of Virginia for further consideration in light of Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973). Bigelow v. Virginia, 413 U.S. 909 (1973).

On November 26, 1973, without calling for further argument, the Supreme Court of Virginia entered a per curiam opinion once again affirming the appellant's conviction. That Court reasoned that the abortion decisions were irrelevant to the issues here, since neither decision "mentioned the subject of abortion advertising" (J.S. 22a). In the words of the court below:

Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of Roe v. Wade and Doe v. Bolton which in any way affects our earlier view. So we again affirm Bigelow's conviction (J.S. 22a).

Summary of Argument

I.

Newspapers are entitled to special protection under the First Amendment. Miami Herald Publishing Co. v. Tornillo, 42 U.S.L. W. 5098. No case since Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921), with the arguable exception of Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), has upheld the power of the federal or state governments to forbid the exercise of free editorial choice or to punish the press for exercising that choice. The conviction of appellant for publishing the advertisement in issue here, violates that principle.

A. The conviction must be reversed because publication of the advertisement is protected by the clear and present danger test and by the "imminent lawless action" test of Brandenburg v. Ohio, 395 U.S. 444

(1969). The advertisement informed Virginia residents that lawful abortions were available in New York state. It was not an integral part of action for there was ample "opportunity for full discussion." Whitney v. California, 274 U.S. 357, 377(1927). For the same reasons, the statute is unconstitutional on its face.

B. The state's authority to regulate in the medical health field cannot save the statute or sustain the conviction. That asserted justification falls in face of the First Amendment argument alone, which was put forward above. However, there are three additional constitutional interests which must be added to the scales in appellant's favor: the right of privacy, the right to travel, and the limitations upon the power of the states to penalize its citizens for actions unlawful in the state of residency but lawful where performed out-of-state. Griswold v. Connecticut, 381 U.S. 479 (1965); Slaughter-House Cases, 16 Wall. 36 (1873); Shapiro v. Thompson, 394 U.S. 618 (1969); Huntington v. Attrill, 146 U.S. 657, 36 L. Ed. 1123, 1128 (1892).

II.

The advertisement was not "purely commercial" speech and is therefore outside the rule of Valentine v. Chrestensen, 316 U.S. 52 (1942). The content of the advertisement and the controversy surrounding its subject matter, Roe v. Wade, 410 U.S. 113, 116 (1973), prohibits a "purely commer-

cial" characterization. Furthermore, "speech is not rendered commercial by the mere fact that it relates to an advertisement." Pittsburgh Press v. Pittsburgh Commission on Human Relations, supra at 384. See N.A.A.C.P. v. Button, 371 U.S. 415 (1963); New York Times v. Sullivan, 376 U.S. 254 (1964).

III.

Section 18.1-63 is overbroad for it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). See also Broadrick v. Oklahoma, 413 U.S. 601 (1973). The statute is overbroad because, for example, it prohibits a speech urging that women have the right to obtain an abortion, prohibits a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere, and prohibits appellant from publishing an editorial in support of the right of abortion.

ARGUMENT

I.

SECTION 18.1-63, ON ITS FACE OR AS APPLIED IN THIS CASE, VIOLATES THE FREE PRESS GUARANTEE OF THE FIRST AMENDMENT.

From the time of the Holmes-Brandeis dissent in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921), through Miami Herald Publishing Co. v. Tornillo, 42 U.S.L.W. 5098 (June 25, 1974), this Court has surrounded newspapers with special protection under the First Amendment, in recognition of the elementary fact that the nation's political institutions are free only insofar as its press is free of governmental regulation or censorship. The Court has consistently resisted attempts by the federal and state governments to invade or diminish the right of newspapers freely to choose the material they will put into print. Whether the attempts have taken the form of prior restraints,3/ subsequent punishments,4/ discriminatory taxes,5/

3/ Near v. Minnesota, 283 U.S. 697 (1931); New York Times v. United States, 403 U.S. 713 (1971).

4/ Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Mills v. Alabama, 384 U.S. 214 (1966).

5/ Grosjean v. American Press Co., 297 U.S. 233 (1936).

or inhibiting forms of libel actions,6/ the Court has uniformly recognized that the purpose of the First Amendment is to insure and encourage a free press as a fundamental instrument of political liberty. Even so conservative a jurist as Mr. Justice Sutherland appreciated the indispensability of a free press in a free society. Speaking for the Court in Grosjean v. American Press Co., supra at 250, he described the function of a free press in the following terms:

> . . . since informed public opinion is the most important of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

The same appreciation permeates the Court's opinion thirty years later in Mills v. Alabama, 384 U.S. 214 (1966). Mr. Justice Black's opinion for the Court said (at 219):

> Suppression of the right of the press to praise or criticise governmental agents and to clamor and contend for or against

6/ New York Times v. Sullivan, 376 U.S. 254 (1964); Butts v. Curtis Publishing Co., 388 U.S. 130 (1967); Rosenbloom v. Metromedia, cf. Gertz v. Welch, Inc., 42 U.S.L.W. 5123 (June 25, 1974).

> change . . . muzzles . . . the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

No case since Burleson (apart, arguably, from Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), see note 7 , infra) is to be found which upholds the power of the federal or state governments to forbid the exercise of free editorial choice or which punishes the press for exercising that choice.

That historical fact is a special feature of our political system and its theme was reemphasized only a few months ago by a unanimous Court in Tornillo:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. 42 U.S.L.W. at 5103.

Even in Pittsburgh Press, a 5 to 4 decision, the majority closely confined its opinion by resting upon the purely commercial

character of the employment want ads involved in the case, the fact that they did not express a position on "a matter of social policy," and the absence of editorial "judgmental discretion" in the content and placement of the ads. And the opinion closed by stating that

> . . . [W]e reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues however controversial. 413 U.S. at 391.7/

Appellant, then, would argue that, as a necessary principle under the First Amendment, he cannot be punished criminally for exercising his editorial choice to publish the advertisement in issue. As Mr. Justice Douglas said in Pittsburgh Press:

> . . . [t]he First Amendment presupposes free-wheeling, independent people whose vagaries include ideas spread across the entire spectrum of thoughts and beliefs. I would let any expression in that broad spectrum flourish, unrestrained by Government, unless it was an integral part of action--. . . 413 U.S. at 399 (dissenting opinion).

7/ The dissenters, of course, thought that even these advertisements were protected by the First Amendment. For a criticism of Pittsburgh Press on First Amendment grounds, see Hepburn, Pittsburgh Press and the First Amendment, 2 Women's Rights Law Reporter 6 (1974).

A. The advertisement is not an integral part of action.

Whether one applies the classic clear and present danger doctrine to the facts of this case, or the "imminent lawless action" test articulated in Brandenburg v. Ohio, 395 U.S. 444 (1969), the result is the same, for the Virginia statute must fall under both tests and publication of the advertisement must be held protected from criminal prosecution and conviction.

It is perfectly clear that the contents of the advertisement at issue were informational, far removed from action, no less imminent action. Though also removed from "mere abstract teaching" [Noto v. United States, 367 U.S. 290, 297 (1961)], since the ad was more than a discussion supporting the idea of abortion, or calling for efforts to persuade a legislature to legalize abortion, it is nonetheless well within the zone of protected speech. The advertisement notified Virginia citizens that abortion was legal in New York State and provided an address and phone number through which abortions could be arranged and through which "information and counseling" was available. As such, it admittedly ran afoul of the statute's own terms, for it must be fairly said that the advertisement may well have "encourage[d] and prompt[ed] some Virginia citizens to procure, or consider procuring, an abortion for themselves, their wives or their friends. But any statute which bans speech which may have a tendency to "encourage or prompt"

outlawed conduct cannot stand in face of the First Amendment, otherwise the spectrum of permissible speech would be radically limited. Speech would be stifled, not encouraged. See New York Times v. Sullivan, supra.

The speech in this case, however, no matter how it may have encouraged or prompted abortion, or consideration of abortion, is well within the parameter of speech protected under the clear and present danger test or the Brandenburg test, because there was, in Mr. Justice Brandeis' words, "opportunity for full discussion" [Whitney v. California, 274 U.S. 357, 377 (1927)], before any interested women obtained an abortion. She could discuss the question with her family, friends, and physician, and fully consider whether to undergo an abortion, once having been informed by the ad that one was available to her in New York State.8/ Clearly, then, publication of the ad was not an integral part of action, and surely not coercive. Cf. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949). Rather, it was a means by which Virginia citizens could be informed of the availability of abortion information

8/ This pragmatic measure of the degree to which an outdoor advertisement presented the necessary clear and present danger of the commission of an abortion, was applied in Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738, 742-743 (E.D. Mich. 1972), as an alternative basis for striking down an ordinance prohibiting advertising of abortions on billboards.

and services and clearly within the area of protected speech as defined in Thornhill v. Alabama, 310 U.S. 88, 102 (1940):

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

The Virginia statute therefore must fall because it undertakes to "contract the spectrum of available knowledge" [Griswold v. Connecticut, 381 U.S. 479, 482 (1965)], and to suppress the flow of information which enables individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child" [Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)], a decision which this Court has now held to be protected by the constitutional right of privacy. Roe v. Wade, 410 U.S. 113 (1973).

B. The State's authority to regulate in the medical health field cannot save the statute or sustain the conviction.

It was the view of the Virginia Supreme Court that Section 18.1-63 was "a reasonable measure to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder" (J.S. 7a). Since that justification was put forward in

support of a statute that affects the First Amendment and the right of privacy, ". . . the State may prevail only upon showing a subordinating interest which is compelling," Bates v. Little Rock, 361 U.S. 516, 524 (1960); and that interest "cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). In light of those constitutional requirements, the State's justification is totally inadequate.

We have argued above that the constitutional interest in freedom of the press, and the correlative right of readers to receive useful information relating to a controversial social issue, requires that appellant's conviction be reversed. Those interests are by themselves so compelling that they are not overcome in this case by Virginia's asserted interest in regulating the medical health field. There are, however, three additional constitutional interests which must be added to the scale in appellant's favor--the right of privacy, the right to travel, and the limitations upon the power of the states to penalize its citizens for actions unlawful in the state of residency but lawful when performed outside that state.

In February 1971, when appellant was tried and convicted for publishing the informational advertisement, abortion was prohibited in Virginia except for the

narrowest exceptions.9/ This prohibition was common, in varying degree, to the vast majority of states in the country. Abortion was, however, legal in New York, as the result of legislation. That legislative choice by New York was both appropriate in terms of its power to protect the health and well-being of its people, and invulnerable to constitutional challenge since the power to permit abortion logically follows from and is encompassed within the power of a state, prior to Roe v. Wade and Doe v. Bolton, to regulate abortion to any degree.

In Roe v. Wade and Doe v. Bolton, the Court held that the fundamental right to privacy includes the decision to have an

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9/ Code of Virginia §18.1-62 (1971 Cumm. Supp.), provided:

> --If any person administer to or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be confined in the penitentiary not less than one nor more than ten years.

Sec. 18.1-62.1, allowed abortion, after 120 days residency, if pregnancy was "likely to result in the death of the woman, or substantially impair [her] mental or physical health"; if the child was likely to be born "with an irremediable and incapacitating mental or physical defect; or if pregnancy was the result of incest or forcible rape."

abortion. That Virginia did not recognize this right in 1971 means neither that it did not at that time inhere in Virginia women, nor that such women could be penalized for seeking to travel out of state to exercise the right in states where abortion was legal.10/

The judicial groundwork for the constitutional right to freedom and privacy in matters intimately affecting marriage, procreation and family relationships was well established by 1971, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); and Skinner v. Oklahoma, 316 U.S. 535 (1942). Even in the absence of such precedents, Virginia women

10/ The Court could dispose of this case very directly and simply by declaring Roe and Doe to have retroactive effect and thus nullifying any conviction based upon a statute which assumed the power of the states to regulate abortion in totality. The Second Circuit did precisely that in U.S. ex rel. Williams v. Preiser, 497 F.2d 337 (1974), where it vacated a 1966 conviction of a physician under New York's anti-abortion statute. Given Roe and Doe, the court said (at 339), "Section 1050 is, 'in legal contemplation, as inoperative as though it had never been passed.' Norton v. Shelby County, 118 U.S. 425, 442 (1886). This declaration of retroactive invalidity assures the supremacy of the newly recognized substantive right over a state's power to punish." See also Davis v. United States, 42 U.S.L.W. 4857 (June 11, 1974).

had the right to travel freely between states for a myriad of purposes, not the least of which was to seek medical treatment legally being dispensed in New York.

The fact that most abortions were illegal in Virginia 11/ at the time of appellant's conviction, thereby raising a superficial similarity to the fact situation in Pittsburgh Press, is of no avail to the State here because the advertisement solicited interest in abortions performed in New York State where they were legal. The case is therefore distinctly different than Pittsburgh Press.

We advert to this state of facts in response to the assertion by the majority in Pittsburgh Press that any First Amendment interest of the newspaper there "is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. at 389 . But that "valid limitation," in turn, is itself altogether absent when the activity advertised is legal where it is to be consummated.12/

11/That some abortions were then legal in Virginia is an aspect of the statute's overbreadth with which we deal in Point III, infra.

12/The ordinance involved in Pittsburgh Press, in recognition of the constitutional inhibition against prohibiting the advertisement of activity not illegal, specifically excluded from coverage jobs exempt from its anti-dis-

In that case, Virginia has no valid interest in prohibiting its citizens from being informed of the availability of the legal activity.

The salient fact is that the advertisement proposes an activity which is to be consummated entirely outside Virginia's boundaries. Apart from the First Amendment considerations canvassed above, we can concede for argument's sake that the case might be different if an advertisement proposed a transaction, lawful elsewhere but illegal in Virginia, where its nature allowed the possibility of consummation in Virginia, for example, the sale of marijuana or fireworks (assuming their illegality in Virginia). In those cases, though the sale outside of Virginia might be lawful, the nature of the advertised commodity would allow it to be imported into and used within Virginia in violation of local law. But an abortion is of an entirely different nature. It is completed upon being performed outside Virginia and there are no contacts between the surgical operation and the State of Virginia except the fortuitous fact that the woman resides

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crimination provisions. 413 U.S. at 380.

The Virginia legislature belatedly acknowledged the same constitutional inhibition by amending Sec. 18.1-63 in 1972 so that it applies only to speech relating to "abortion or miscarriage to be performed in this State . . ." See note 1, supra, for the full text of the amended statute.

there. Virginia can assert an interest in banning the advertisement in issue here only if it also intends to assert the power to punish Virginia residents who undergo abortions outside its jurisdiction, or who engage in any other activity which is illegal in Virginia though lawful where performed. But it has no such power, for the States can impose criminal sanctions only for conduct within its jurisdiction. Huntington v. Attrill, 146 U.S. 657, 36 L.Ed. 1123, 1128 (1892). To say that the state has that power is to invest state government with a degree of paternalistic power over its citizens and over their right to travel about the United States and freely conform to the laws of the various states through which they travel, which would violate the privileges and immunities clause, see The Slaughter-house Cases, 16 Wall. 36 (1873), and the more modern constitutional right to travel which is protected by the due process clause of the Fourteenth Amendment, Shapiro v. Thompson, 394 U.S. 618 (1969).

Last term the Court struck down a residency requirement for county-paid health cases as violative of the right to travel. Memorial Hospital et al. v. Maricopa County, et al., 42 U.S.L.W. 4277 (February 26, 1974). The issue there was a residency requirement. A similar residency requirement for medical care--specifically for abortions--was struck down by this Court in Doe v. Bolton, in terms that affect any state statute which would confine the citizens of

one state to that state for medical treatment or hinder their travel to other states for such treatment:

> Just as the Privileges and Immunities Clause Constitution Article IV §2 protects persons who enter other states to ply their trades, [citations omitted], so must it protect persons who enter Georgia seeking the medical services that are available there. See Toomer v. Witsell, 334 U.S. 385, 396-397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

Certainly, if the receiving state cannot prohibit migration travel to its cities for medical care, surely the state from which some migrants come may not restrict them either.

These considerations of the limits upon state power, combined with dominant First Amendment aspects of this case, and the special constitutional protections extended to decisions whether or not to bear children, all combine to overwhelm the slim interest, if indeed it is a valid interest at all, asserted by the Virginia Supreme Court. That interest cannot survive the competing constitutional considerations which we have described.13/

13/ In Hiett v. United States, 415 F.2d 664 (1969), the Fifth Circuit struck down a federal statute (18 U.S.C. §1714)prohibiting use of the mails for advertisements giving information on the availability of foreign divorces on the ground, inter alia, that "information on matters of social importance, especially those relating to the marriage relation and the exercise of rights arising from the relation, is also given extensive Constitutional protection. Griswold v. Connecticut"(at 672).

II.

THE ADVERTISEMENT IN THIS CASE WAS NOT "PURELY COMMERCIAL" SPEECH.

It will be argued, of course, as the Supreme Court of Virginia held, relying principally upon Valentine v. Chrestensen, 316 U.S. 52 (1942), that none of the foregoing analysis bears on this case because the advertisement in issue was commercial speech and therefore stripped of all constitutional protection, including the First Amendment.

By invoking the magical phrase, "commercial advertising," the Supreme Court of Virginia has allowed the imposition of criminal punishment upon a newspaper editor for publishing information of political and social importance, merely because it was imparted in the form of an advertisement and described services available for a fee.

But the advertisement, by virtue of its content and the controversy surrounding its subject matter, cannot therefore be conclu-

sively characterized as "purely commercial" and thus stripped of First Amendment protection.14/

This Court has consistently rejected state attempts to exclude categories of speech from the safeguards of the First Amendment by attaching labels to the kinds of expression involved. See N.A.A.C.P. v. Button, 371 U.S. 415 (1963); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Pittsburgh Commission on Human Relations, supra. Rather, the Court has examined the content of the speech and protected the expression of opinion or the communication of information, regardless of whether labels such as "solicitation" (Button) or "libel" (Sullivan) are sought to be applied to the speech. In this case, if the identical information--describing the legality of abortion in New York and identifying agencies from which further information could be obtained--had been contained in the text of a news article or editorial, the First Amendment would surely have protected appellant against conviction under the statute at issue. See Pittsburgh Press, 413 U.S. at 391. Only a strained

14/ It is important to emphasise the precise holding in Valentine:

> . . . [T]he Constitution imposes no such restraint on government as respects purely commercial advertising. 316 U.S. at 54 (emphasis added).

application of the commercial speech doctrine yields a different result here.

First, it is clear that ". . . speech is not rendered commercial by the mere fact that it relates to an advertisement," Pittsburgh Press, 413 U.S. at 384, nor by the fact that the newspaper is paid for publishing the advertisement. Ibid.; New York Times v. Sullivan, supra, at 266. Similarly, First Amendment protection cannot be withheld because the communication involves the solicitation of funds or because of the profit-making nature of the advertiser; the existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." Ginzburg v. United States 383 U.S. 463, 474 (1966); New York Times Co. v. Sullivan, supra; Smith v. California, 361 U.S. 147 (1959); Jamison v. Texas, 318 U.S. 413 (1943).

Instead, this Court has indicated that the content of the advertisement must be examined to decide whether, on the one hand, it contains "purely commercial advertising" which does "no more than propose a commercial transaction . . ." Pittsburgh Press, 413 U.S. at 385, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), or, on the other hand, it ". . . communicate[s] information, express[es] opinion, recite[s] grievances, protest[s] claimed abuses . . ." or seeks financial support for an important social movement. New York Times Co. v. Sullivan,

supra at 266. But the Court has not identified the criteria by which to determine where a particular advertisement will be placed on the spectrum. In Valentine, where the commercial speech exception originated, the advertisement was a flyer announcing the sale of admission to a submarine on exhibit. In Pittsburgh Press, the classified advertisements were characterized as "no more than a proposal of possible employment" and thus "classic examples of commercial speech." 413 U.S. at 385.

Here, by contrast, the advertisement contained much more than a proposal for a commercial transaction and consequently cannot be characterised as "purely commercial."

First, it explicitly provided the information that the law in New York had been changed, that abortions there were legal, and that no residency requirements were imposed. At the time the advertisement appeared, such information was vital to persons in Virginia attempting to deal with matters as fundamental ". . . as the decision whether to bear . . . a child." Eisenstadt v. Baird, supra at 453. Surely, such information ranks higher on the scale of First Amendment interests than does information about a submarine tour. See, Associated Students for the University of California at Riverside v. Attorney General, 368 F. Supp. 11 (D.C.Cal. 1973)(three-judge court) and Atlanta Cooperative News Project v. United States Postal Service, 350 F. Supp.

234 (N.D.Ga. 1972)(three-judge court)(holding unconstitutional the federal statutes, 18 U.S.C. §1461 and 39 U.S.C. §3001, prohibiting the mailing of abortion information).

Similarly, the information that New York had legalized abortions was important not just to persons dealing with pregnancy, but to citizens in Virginia generally. The knowledge that other states had altered their laws on such a controversial subject as abortion is likely to have a tangible impact on the attitudes of persons concerning restrictive laws in their own state. Such realization, in turn, may prompt an individual to take steps to change the law. And thus, the statement that "Abortions are now legal in New York" has a direct potential for fueling the process of self-government which is at the heart of First Amendment concern. See, e.g., Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969).

Finally, in the circumstances here, the very running of the advertisement is an implicit editorial endorsement of the legality of abortions and the availability of abortion information and services. The newspaper in which the advertisement appeared was not a regular, establishment paper, but an "underground" paper, run by a "collective" whose staff members were expressly and openly concerned with the entire abortion issue (J.S. 4a). In 1971 when this advertisement appeared in appellant's newspaper, abortion was an issue of great political, social, and

moral debate, and it remains so today. Abortion laws have been the subject of intense controversy in the public forum, the legislatures, political campaigns and in the courts. Indeed, its controversial nature was explicitly recognized in the preface to this Court's decision in Roe v. Wade, 410 U.S. at 116:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

Given the content and the context of this advertisement, it must be read as an implicit expression of editorial opinion on the subject matter involved.15/

15/ By the same token, under these circumstances the decision to run this particular advertisement implicated the newspaper's editorial judgment and processes in a way that the decision on placement of employment advertisements in Pittsburgh Press did not.

To paraphrase the Court in Pittsburgh Press, the advertisement here resembles the one in New York Times Co. v. Sullivan more closely than the handbill in Valentine v. Chrestensen, and, therefore, cannot be categorized as "purely commercial advertising," beyond the pale of the First Amendment.16/

Inflexible application of the commercial speech doctrine is particularly dangerous where the medium regulated is a newspaper. With the exception of this Court's sharply

16/ Judge Wright, though describing as "persuasive" the arguments that product advertising "is generally unrelated to the values which the First Amendment was designed to preserve," Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 592 (D.D.C.1971), has said:

> But it does not follow from their general validity that the words "product advertising" are a magical incantation which, when piously uttered, will automatically decide cases without the benefit of further thought. Thus when commercial speech has involved matters of public controversy [citing New York Times v. Sullivan, supra, and Thornhill v. Alabama, supra] or artistic expression [citing Smith v. California, 361 U.S. 147 (1959)], or deeply held personal beliefs, [citing United States v. Ballard, 322 U.S. 78 (1944)], the courts have not hesitated to accord it full First Amendment protection.

divided decision in Pittsburgh Press, the Court has traditionally and consistently singled out newspapers for special First Amendment protection. See Point I.A., supra. Thus, the reliance below on decisions employing the "commercial" speech doctrine in the area of television and radio broadcasting is irrelevant. Decisions such as New York State Broadcasters Association v. United States, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970); Banzhaff v. F.C.C., 405 F.2d 1082 (D.C.Cir. 1968); cert. denied, sub nom. Tobacco Institute Inc. v. F.C.C., 396 U.S. 842 (1969); and Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971)(three-judge court), aff'd sub nom., Capital Broadcasting Co., et al. v. Acting Attorney General, et al., 405 U.S. 1000 (1972), were premised either on the federal government's broader power to regulate the electronic media or on a specific, historic congressional policy over the substantive problem, for example, the use of government regulated instrumentalities to conduct lotteries. These decisions merely reflect the distinctions between free print media and regulated electronic media; they cannot be invoked as the basis for suppressing the former.

To allow the commercial advertising doctrine to serve as the basis for sustaining the appellant's conviction is to sanction a "disturbing enlargement" of that doctrine "and a serious encroachment on the freedom of the press guaranteed by the First Amendment." Pittsburgh Press, 413 U.S. at 393

(Burger, Ch. J., dissenting). If the doctrine allows criminal punishment of a newspaper editor for publishing an advertisement supplying information about a lawful medical service which was the subject of great social controversy, then the question of the continued vitality of the commercial advertising exception from First Amendment protection would surely have to be confronted.17/

17/ A variety of courts and commentators have urged that the rigid commercial speech doctrine be relaxed to allow some First Amendment protection for advertising. For example, in United States v. Pellegrino, 467 F.2d 41, 45 (1972), the Ninth Circuit observed:

> We cannot agree with the Government that advertising is devoid of literary, artistic or other social value and accordingly is less deserving of First Amendment protection than the substance of that which is advertised. Advertising performs an important First Amendment function in aid of communication.

On this Court, Mr. Justice Douglas, though he joined the unanimous opinion in Valentine v. Chrestensen, announced eighteen years ago that that ruling "has not survived reflection." Cammarano v. United States, 358 U.S. 498, 513 (1958). The First Amendment, he said (at 514):

> . . . is not in terms or by implication confined to discourse of a particular kind and nature . . . The profit motive should make no difference, for that is an element inherent in the very conception of a free press under our system of free enterprise . . . Chief Justice Hughes speaking for the Court in Lovell v. Griffin, 303 U.S. 444, 452 defined the First Amendment right with which we now deal in the broadest terms, 'The Press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Mr. Justice Douglas reaffirmed that view in Dun and Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-905 (1971)(dissent), and Pittsburgh Press, 413 U.S. at 397-398. See also the opinions of Mr. Justice Stewart in Pittsburgh Press, 413 U.S. at 401, and of Mr.Justice Brennan in Lehman v. Shaker Heights 42 U.S.L.W. 5116, 5121, n. 6 (June 25, 1974) (dissenting opinion); and see Note, Freedom of Expression in a Commercial Context, 78 Harv.L.Rev. 1191 (1965); Redish, The First Amendment in the Market Place: Commercial Speech and Values of Free Expression, 39 Geo.Wash.L.Rev. 429 (1971).

III.

SECTION 18.1-63 IS OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

The overbreadth of this statute, simultaneously prohibiting expression which arguably can be proscribed and that which may not, is apparent. By its terms, it prohibits a speech urging that women have a right to obtain an abortion; it prevents a husband from discussing the possibility of an abortion with his pregnant wife; it prevents a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere; it suppresses abortion information supplied by a non-profit, noncommercial agency; in fact, it prohibits appellant from writing and publishing an editorial which could be said to encourage abortion. It simply "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). See, Hiett v. United States, supra; Mitchell Family Planning, Inc. v. City of Royal Oak, supra at 741-742. Thus it suffers from the fatal constitutional defect of overbreadth.

This Court has required that provisions impinging upon areas protected by the First Amendment must be drawn with sufficient narrowness and precision to insure that First Amendment freedoms retain the "breathing space" necessary for robust survival. E.g. Note, The First Amendment Overbreadth

Doctrine, 83 Harv. L. Rev. 844 (1970); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960); Broadrick v. Oklahoma, 413 U.S. 601 (1973). As was true of the statute in Spence v. Washington, 42 U.S.L.W. 5148, 5151, n. 9 (June 25, 1974), Sec. 18.1-63 is of "limitless sweep" and must therefore fall. See also Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Keyshian v. Board of Regents, 385 U.S. 589 (1967); Cox v. Louisiana, 379 U.S. 536 (1965); Plummer v. Columbus, 42 U.S.L.W. 2222 (Oct. 16, 1973).

In Broadrick, Mr. Justice White articulated the rationale underlying the First Amendment overbreadth doctrine when he stated:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendmend rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Thus, Section 18.1-63 cannot survive constitutional scrutiny if its proscriptions are so broadly drawn as to justify a "judicial prediction or assumption" that it will induce third persons to refrain from protected activity as a consequence. The statute plainly has that exact effect and is therefore unconstitutional.

As Mr. Justice White noted in Broadrick, a second policy underlying the First Amendment doctrine is a concern that no penal statute, especially in the First Amendment area, may vest a local functionary with "standardless" discretion to determine whether or not a given form of expression falls within its proscription. It is, of course, a truism to observe that any such overbroad statute is a licensing provision, permitting only that expression tolerated by local officials to flourish.

In Cox v. Louisiana, 379 U.S. 536 (1965), this Court, in declaring a broadly worded breach of the peace statute unconstitutional, stated:

> [t]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. 379 U.S. at 557.

In Thornhill v. Alabama, 310 U.S. 88 (1940) a broad anti-picketing ordinance was invalidated because:

> The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. 310 U.S. at 97-98.

That second defect is apparent on the face of Sec. 18.1-63 and from the record in this case. As we have already mentioned above, the statute's very terms allow standardless application. Furthermore, the record shows that appellant, whose publication is an unorthodox underground newspaper, was prosecuted, but that Redbook Magazine, an

established orthodox publication, was not, even though it carried "abortion information from across the United States" (App.p.3). Though it will no doubt be said that the difference is that Redbook's information was editorial whereas appellant's was an advertisement, it can, of course, as well be said that the difference is that Virginia chose to prosecute appellant because they disliked his publication, and chose not to prosecute Redbook--though the terms of the statute allow it--because of its size, prominence and reputation. For that additional reason, Sec. 18.1-63 must be declared unconstitutional.

A. Appellant has standing to argue the overbreadth of the statute.

The court below, explicitly refusing to give the statute a limiting construction, compare New York State Broadcasting Association v. United States, supra, 414 F.2d at 997, held that because appellant's activity was "commercial," he lacked standing to challenge the statute's overbreadth.18/ In reaching this conclusion, the Supreme Court of Virginia relied exclusively and improperly on Breard v. Alexandria, 341 U.S. 622 (1951). Breard involved an ordinance

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18/ The court did state in dictum that it would not interpret the statute to encompass some of the suggested hypothetical applications, but the holding rested on the conclusion that the appellant lacked standing to raise these arguments (J.S. 9a-10a). In any case, the ostensible narrowing of the statute is insufficient. See Gooding v. Wilson, supra.

prohibiting uninvited soliciting by door-to-door salesmen of magazine subscriptions. In response to a First Amendment challenge, this Court observed: "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes." Id. at 641. Even under this reasoning, the appellant, as a member of the press, was entitled to mount an overbreadth challenge to this statute.

More importantly, the decision below simply ignored this Court's contemporary overbreadth doctrine that one whose own conduct is not protected may nevertheless raise a challenge to an overly broad statute: "Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). As the Court explained last Term, in the First Amendment area the normal standing rules are relaxed in order to enforce the requirement that statutes which regulate expression are narrowly and precisely drawn:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. Broadrick v. Oklahoma, 413 U.S. at 612.

And allowing an overbreadth challenge is particularly appropriate where, as here, the statute directly regulates expression.

Finally, the employment of an overbreadth analysis is not undermined by the recent change in the statute. The amendment in no way narrowed the reach of the statute, but simply added a prohibition on "the use of a referral agency for profit" to "encourage or promote the processing of an abortion . . . " See note 1, supra. Virginia still provides that, "If any person, by publication, lecture, advertisement, or by sale or circulation of any publication, . . . or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor." And thus since Virginia still claims the authority to punish protected expression, "manifestly, strong medicine" must be administered. Broadrick v. Oklahoma, supra, at 613.

CONCLUSION

For the reasons stated above, appellant's conviction must be reversed and Section 18.1-63 declared unconstitutional.

Respectfully Submitted,

MELVIN L. WULF
JOEL M. GORA
JUDITH MEARS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

JOHN C. LOWE
F. GUTHRIE GORDON, III
American Civil Liberties
Union of Virginia
1111 West Main Street
Charlottesville, Virginia

Attorneys for Appellant

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